Court of King's Bench of Alberta

Citation: Landry v Aurora Cannabis Inc, 2025 ABKB 387

Date: 06252025
Docket: 2003 12747
Registry: Edmonton

Between:

Robert Laundry and Gill Fruchter on Their Own Behalf and as Proposed Representative Plaintiffs

Plaintiffs

- and -

Aurora Cannabis Inc., Terry Booth, and Glen Ibbott

Defendants

Memorandum of Decision of the Honourable Justice M.E. Burns

---

[1] The Applicants, Aurora Cannabis Inc., and two former officers and directors ("Aurora") seek to strike an Amended Statement of Claim or, alternatively, seek to disallow the addition of Gill Fruchter as a plaintiff and to strike several of the amendments.

[2] In its' written argument Aurora states that the overarching issues are whether this Court should dismiss this action and/or disallow the Amended Statement of Claim in whole or in part. Aurora's argument is premised on the assertion that the representative plaintiff in the original action, Robert Landry, was not a member of the class he purports to represent. The Amended Statement of Claim was filed to add Mr. Fruchter, essentially, just in case.

[3] If Mr. Landry is ***not*** a member of the class, the amendments to the Statement of Claim raise many issues including:

(a) Can a class action proceeding be commenced by a non-class member?

(b) Can a class action proceeding be continued by a non-class member?

(c) Can a new representative plaintiff (i.e. Mr. Fruchter) be substituted or added to the class action proceeding?

(d) If the original class action proceeding is voided by Landry's technical deficiencies as a representative plaintiff, what recourse is available to other class members?

(e) Will there be limitation issues for the class members?

[4] If Mr. Landry ***is*** a representative of the class, it is unclear as to the degree with which Aurora has concerns about the Amended Statement of Claim, because the enumerated issues raised above would not be at play.

[5] To make any substantive determination in this application I must answer the preliminary question: Is Mr. Landry a member of the class he purports to represent.

Background

[6] After the close of trading on September 11, 2019, Aurora released financial statements that allegedly amount to negligent misrepresentation. The statements were allegedly partially corrected on November 14, 2019, and a full correction eventually followed after the close of trading on December 20, 2019.

[7] Mr. Landry was an investor who owned $1.9 million in 225,000 shares of Aurora Cannabis Inc. stock ["ACB"] as at September 12, 2019. On November 20, 2019, Mr. Landry sold 75,000 ACB shares, leaving him with 150,000 shares remaining. On November 21, 2019, Mr. Landry purchased **and** sold 175,000 ACB shares in two separate transactions. On November 22, 2019, Landry purchased **and** sold 169,000 ACB shares in the same day. By December 21, 2019, Landry held 150,000 ACB shares, now with an approximate value of $500,000.

[8] Mr. Landry filed a Statement of Claim on August 10, 2020, as representative plaintiff on behalf of a common law and a statutory class of litigants. He alleged two causes of action against Aurora:

1) Common law negligent misrepresentation; and

2) Statutory secondary market misrepresentation under the Alberta *Securities Act* RSA 2000, c S-4, with leave. Mr. Landry filed the application for leave to proceed under this cause of action on February 1, 2022, within the 3-year statutory limitations period.

[9] In the course of exchanging materials on Mr. Landry's application for leave in 2024, Aurora's counsel argued that Mr. Landry was not a member of the proposed class.

[10] Mr. Landry served an Amended Statement of Claim on March 11, 2024. The Amended Statement of Claim included adding Mr. Fruchter as a Plaintiff.

[11] On March 21, 2024, the Defendants served their application to disallow the amendments and dismiss the action.

Issues

[12] The fundamental issues to be resolved are:

1) Is Mr. Landry a member of the class?
2) Does the Action constitute an abuse of process?
3) Is Mr. Landry's common law claim untenable?
4) Are Mr. Fruchter's claims untenable?
    a) Are the claims time barred?

Analysis

Is Mr. Landry a member of the class?

[13] The parties fundamentally disagree as to whether Mr. Landry is a class member with the standing to bring these claims. They do not disagree on the underlying facts, particularly the facts relating to Mr. Landy's trading in the Aurora shares.

[14] Aurora argues that Mr. Landry:

(a) Did not purchase any Aurora shares between 11 September – 14 November 2019, when the original [alleged] misrepresentation was floating around in the market without any correction. Mr. Landry only resumed trading *after* the partial corrective statement was issued on November 14, 2019, meaning that he should be deemed to have been aware of the correction, and that he cannot have acted in reliance on the original statement at that point; and

(b) Mr. Landry did not suffer any financial loss from his trading on November 21 and 22 2019, because he realized a capital gain from it.

[15] Aurora argues that Mr. Landry is excluded from class membership as a result.

[16] The Statement of Claim defines the two classes that Mr. Landry purports to represent:

> (a) a "Common Law Class", being "all persons . . . who acquired ACB's securities on the TSX secondary market on **or** after September 11, 2019, and who held some or all of those securities until after the close of trading on November 14, 2019, November 18, 2019, November 29, 2019, **or** December 21, 2019"; and
>
> (b) a "Statutory Class", being "all persons . . . who acquired [ACB] securities on the TSX secondary market on **or** after September 11, 2019, and who held some or all of those securities until after the close of trading on November 14,

> 2019, November 18, 2019, November 29, 2019, **or**
> December 21, 2019".
>
> [Emphasis added]

[17] A plain meaning interpretation of the class definitions is that everyone who bought ACB shares after the original alleged misrepresentation on September 11, 2019, and who then held onto some or all of the stocks until after the original alleged misrepresentation was entirely corrected on December 21, 2019, would be a member of the class.

[18] On the uncontested facts, Mr. Landry bought shares on or after September 11, 2019, and held some or all of those securities until after the close of trading on November 14, 2019, November 18, 2019, November 29, 2019, or December 21, 2019.

[19] Aurora argues that Mr. Landry did not acquire shares between September 11, 2019, and November 14, 2019 (which is accepted as fact) and because Mr. Landry was not active on the market during the peak initial phase of the alleged misrepresentation, he does not belong to the class of affected investors at all. This is patently wrong. The class definition is not limited to those who purchased between September 11 and November 14. It includes those who purchased between September 11 and December 21.

[20] Mr. Landry resumed trading on November 21 and 22, after the alleged first partial correction of the September 11 alleged misrepresentation. Aurora argues that he could not have been acting in reliance on the September 11 statement by that point, because (in effect) the alleged misrepresentation had been entirely corrected by the November 14 alleged correction.

[21] In Aurora's interpretation, anyone who acquired shares *after* November 14 is deemed to have been aware of the corrective disclosure and cannot belong to the common law class. This ignores the pleadings in the Statement of Claim that clearly allege that the original alleged misrepresentation was not remedied November 14 and that the class included those who held shares until December 21 after trading.

[22] Mr. Landry participated in the market during the period in question and pleads that he suffered damages. I find he is a member of the Statutory Class, and the Common Law Class definitions set out in the Action. Given my finding that Mr. Landry is a member of the class, there was no abuse of process in the commencement of the action.

LIFO/FIFO

[23] Aurora argues that, even if Landry *did* fit within the common law class definition, he clearly did not sustain a loss because he was day trading on November 21 and 22, 2019. If anything, it gave him a taxable capital gain, because his shareholdings had a higher pre-tax value by the end of business on November 22, 2019, than they did on November 21, 2019.

[24] Aurora adopts a "last in, first out" ("LIFO") accounting strategy to argue that Landry's parallel transactions on November 21 and 22, 2019 dealt with the same singular block of shares. For example, on November 21, he bought 175,00 shares; in Aurora's argument, he sold those same shares that very same day, leaving him with no new interest in the company arising during the class period. On this interpretation, Mr. Landry is not an eligible member of the proposed class.

[25] Mr. Landry resists this interpretation. He adopts a "first in, first out" ("FIFO") accounting strategy to argue that his buying and selling on November 21 and 22 were entirely separate transactions dealing with entirely different stocks. He intended to sell his oldest stocks, acquired at lower prices at various points in the pre-class period, and then repurchase the same quantity of new stocks at the current market value. Under this interpretation, Mr. Landry *is* an eligible member of the proposed class. Given the fact that the *ASA* does not explicitly proscribe an accounting strategy, this interpretation is equally plausible to the one proposed by Aurora. Mr. Landry's counsel further advises that the FIFO accounting strategy is common to other class action securities litigation.

[26] I find this argument is a red herring. Whether, or how much, Mr. Landry in fact lost as a result of the actions of Aurora is a matter to be determined by the trial justice, not at this stage of the proceedings. The definition of class does not require proof of loss. I find that Mr. Landry was participating in the market during the period at issue. That is enough to find he is a class member with standing to represent the class.

The Action does not constitute an abuse of process

[27] Given my finding that Mr. Landry is a member of the class, this argument is dismissed. There was no abuse of process in the commencement of the action.

Mr. Landry's common law claim is *not* untenable

[28] Mr. Landry asserted a common law claim for negligent misrepresentation against the defendants. Aurora argues that the claim for negligent misrepresentation should be dismissed on the basis that it is legally untenable.

[29] First, Aurora argues that Mr. Landry did not rely on the alleged Impugned Statements as he had purchased his ACB shares before the statements were made. While I cannot determine if Mr. Landry did or did not rely on the Impugned Statements, as this will be a question for the trial justice, I have found that Mr. Landry was participating in the market after September 11, 2019, so this argument is not "untenable" or doomed to failure.

[30] Second, Aurora also argues that the claim is untenable because Mr. Landry would be in the same position whether or not the alleged Impugned Statements had been made.

[31] Mr. Landry indicates in his Statement of Claim that "had the Defendants not omitted the material facts as alleged herein, Robert Landry would have sold all of his ACB securities on or about September 12, 2019". On that basis Aurora theorizes that Mr. Landry could not have suffered any damages from the drop in share prices following the corrective statements because had Aurora "not omitted the material facts" on September 11-12, 2019, the shares would have dropped at that time and Mr. Landry would be in the same position on September 12, 2019, whether or not the alleged Impugned Statements had been made or not.

[32] Aurora's argument on damages is also something that should be determined at trial. At this point trying to argue whether or not the Plaintiffs would be in the same position whether or not the impugned statements had been made is premature.

[33] A court should not conclude that pleadings fail to disclose a cause of action unless it is "plain and obvious" that the pleadings do not: see ***Bruno v Samson Cree Nation***, 2021 ABCA 381 at para 65. On a motion to strike, the pleading should be read generously to accommodate

any inadequacies in the form of the allegations due to drafting deficiencies, because cases should be disposed of on their merits: ***Atlantic Lottery Corp. Inc. v Babstock***, 2020 SCC 19 at para 88.

[34] Mr. Landry asserts that his common law claim is that he held his shares in reliance on Aurora's misrepresentations and that he was induced by the Defendants' misrepresentations to purchase and hold the shares rather than look for other investments. This is not a situation where it is plain an obvious that the pleadings fail to disclose a cause of action. Giving a generous read to the pleadings and the common law claim asserted, it is not plain and obvious that it is bound to fail or is "untenable".

Mr. Frutcher's claims

[35] As noted above, if Mr. Landry had not been a member of the class, the amendments to the Statement of Claim would have raised many issues including:

(a) Can a class action proceeding be commenced by a non-class member?

(b) Can a class action proceeding be continued by a non-class member?

(c) Can a new representative plaintiff (i.e. Mr. Fruchter) be substituted or added to the class action proceeding?

(d) If the original class action proceeding is voided by Landry's technical deficiencies as a representative plaintiff, what recourse is available to other class members?

(e) Will there be limitation issues for the class members?

[36] However, Mr. Landry ***is*** a member of the class and the proposed representative of the class, and therefore it is unclear whether Aurora will continue to have concerns about the Amended Statement of Claim adding Mr. Fruchter.

Are Mr. Fruchter's claims time barred?

[37] Aurora argues that Mr. Fruchter's claims are time-barred because there is no tolling under the *ASA* or the *CPA* in respect of his claims. The Plaintiffs argue that both the common law and statutory limitation periods are tolled.

Limitation Period under the *CPA*

[38] Given my finding that Mr. Landry is a class member, I accept the Plaintiffs' argument that the amendments to add Mr. Fruchter were not time-barred because Mr. Landry was in fact a valid member of the putative class and that the filing of the Statement of Claim on August 10, 2020, tolled the limitation period for the common law misrepresentation claims. In addition, if Mr. Fruchter`s claim was found to be time barred, it would be contrary to the purpose of the tolling of the limitation period to protect potential class members from the expiry of a limitation period until the certification of the class action is determined.

[39] The Supreme Court of Canada discussed the purpose of a similar provision to s 40 in the Ontario *CPA*. In ***Canadian Imperial Bank of Commerce v Green***, 2015 SCC 60 the Court stated:

> 60 The purpose of s. 28 CPA is to protect potential class members from the winding down of a limitation period until the

> feasibility of the class action is determined, thereby negating the need for each class member to commence an individual action in order to preserve his or her rights: ***Coulson v. Citigroup Global Markets Canada Inc***., 2010 ONSC 1596, 92 C.P.C. (6th) 301(Ont. S.C.J.), at para. 49, quoted with approval by the Court of Appeal, 2012 ONCA 108, 288 O.A.C. 355(Ont. C.A.), at para. 11. Once the umbrella of the right exists and is established by a potential class representative in asserting a cause of action, class members are entitled to take shelter under it as long as the right remains actively engaged. The provision is squarely aimed at judicial economy and access to the courts, encouraging the former while preserving the latter. [emphasis added]

Limitation Period under the ASA

[40] It is not contentious that the limitation period relating to Mr. Fruchter's secondary market claim is made under s 211.03 of the *ASA* and the limitation period is governed by section 211.095(1) and (2) of the *ASA*. Section 211.095(1) provides:

> 211.095(1) No action shall be commenced under section 211.03,
> (a) in the case of misrepresentation in a document, later than the earlier of
>
> i. 3 years after the date on which the document containing the misrepresentation was first released, and
>
> ii. 6 months after the issuance of a news release disclosing that permission has been granted to commence an action under section 211.03 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation […]

[41] Subparagraph (b) of subsection 211.095(1) of the *ASA* provides the equivalent limitation period for alleged misrepresentations in public oral statements.

[42] Tolling of the limitation period is addressed at s 211.095(2) of the *ASA*:

> 211.095(2) A limitation period established by subsection (1) in respect of an action is suspended on the date an application for leave under section 211.08 is filed with the court and resumes running on the date,
>
> (a) the court grants leave or dismiss the motion and,
>
> i. all appeals have been exhausted, or
>
> ii. the time for an appeal has expired without an appeal being filed, or
>
> (b) the motion is abandoned or discontinued.

[43] The Plaintiffs position is that the limitation period was tolled on January 31, 2022, when Mr. Landry filed his Leave Application. Aurora disagrees with the Plaintiffs interpretation of s. 211.095(2) of the *ASA*. They indicate that the tolling of the limitation period is only applicable to

Mr. Landry's claim, not the claim of a potential but unasserted claim of a non-party in respect of the same alleged misrepresentation. That is, the tolling of the limitation period does not apply to Mr. Fruchter.

[44] Aurora further argues that s 211.095(1) of the *ASA* provides that the limitation period for secondary market claims expires on the earlier of: (a) 3 years after the impugned statements were made; or (b) 6 months after the issuance of a news release disclosing that permission has been granted to commence an action under s 211.03 […]. Given that the legislature was aware that the same alleged misrepresentations by a defendant might give rise to multiple actions by purchasers of shares and that the legislature did not make mention of such in section 211.095(1) it is clear that the statute does not obviate a plaintiff's need to such to prevent the expiration of the limitation period.

[45] I note neither party cited caselaw on this point.

[46] I find that on an ordinary reading of s 211.095(2) the limitation period is tolled "in respect of an action" on the date an application for leave under section 211.08 is filed. There is only one action here and an application under that section was made such that the limitation period is tolled.

Remaining Arguments

[47] Aurora referenced several other arguments without providing detailed arguments or case support. Aurora argues that the Plaintiffs' revised claim for negligent misrepresentation set out in paragraphs 35 to 44 of the Amended Statement of Claim and the amended and expanded definition of Common Law Class at paragraph 1(c) of the Amended Statement of Claim (i) are barred by the application of section 3(1) of the Limitations Act and (ii) even if not barred, do not disclose a cause of action;

[48] The test for whether a cause of action is disclosed by pleadings is whether it is plain and obvious, assuming the facts pleaded to be true, that each of the plaintiff's pleaded claims disclose no reasonable cause of action (***Atlantic Lottery Corp Inc v Babstock***, 2020 SCC 19 at para 14***; Klassen v Canadian National Railway Company***, 2023 ABCA 150 at para 25 (***Klassen***)).

[49] In this case, the Plaintiffs assert a cause of action in negligent misrepresentation. The elements of negligent misrepresentation are: there must be a special relationship between the representee and the representor; the representation must have been untrue, inaccurate or misleading; the representor must have acted negligently in making the representation; the representee must have relied, in a reasonable manner, on the representation; and his reliance must have been detrimental to the representee causing him damage (***Queen v Cognos Inc***, [1993] 1 SCR 87 at 110; ***Alberta v Cox***, 2017 ABCA 5 at para 67).

[50] It is not plain or obvious to me that the Plaintiffs' claim of common law negligent misrepresentation cannot succeed. Their Amended Statement of Claim pleads sufficient facts upon which a claim of negligent misrepresentation is not bound to fail. The Plaintiffs plead that a special relationship exists giving rise to a duty of care; that inaccurate representations were negligently made; and that they detrimentally relied on these representations. The cause of action is made out on the pleaded facts.

[51] The question is then whether this new pleading is barred by the *Limitations Act*, RSA 2000, c L-12. Amending a Statement of Claim to include a new claim may be allowed in certain circumstances under section 6 of the *Limitations Act*, RSA 2000, c L-12. An added claim, per s 6 of the *Limitations Act*, is not the same as a new cause of action: ***Greentree v Martin***, 2004 ABQB 365 at para 13:

> I think that while the cause of action established by the amendment is different from the cause of action in the original pleading, the [*Limitations Act*] does not speak of causes of action, but rather events and occurrences. In my view, that is a much broader perspective.

[52] In the context of deciding whether an amended pleading raises a new cause of action which may be limitations barred, or merely substantiates an existing claim, the term "cause of action" typically refers to the factual matrix giving rise to the claim rather than the legal nature of the claim. Justice Dario in ***Condominium Corporation No 00311443 v Goertz***, 2022 ABQB 104 at para25 remarked that:

> The determination of whether an amendment arises out of the same events as the original pleading is a matter of degree and judgment with which a certain amount of specificity is required: ***Dow*** at para 70. Under this Rule, the issue is not whether the amendments raise a new cause of action, but whether they raise a new claim, which is defined as "a matter giving rise to a civil proceeding in which a claimant seeks a remedial order.": ***Geophysical Service Incorporated v Husky Oil Limited,*** 2018 ABQB 622 at para 25 , aff'd on this ground 2018 ABCA 380, leave ref'd 2019 CanLII 45275 (SCC), citing ***Canadian Natural Resources Ltd v Arcelormittal Tubular Products Roman SA***, 2012 ABQB 679 at para 400 and ***Stolk v 382779 Alberta Inc***, 2005 ABQB 440 at paras 21-22.

[53] If amendments relate to the same sequence of events and same relationship between the parties, then they might not constitute added claims (such as in ***Stolk v 382779 Alberta Inc***, 2005 ABQB 440 (***Stolk***)). In that case, it was held that the proposed amendments mostly particularized details relating to the factual context and allegations of negligence and breach of contract raised in the original pleadings (***Stolk*** at paras 20–30).

[54] I find that the amendments made here also particularize details raised in the original pleadings and are not outside the time limits established in the *Limitations Act*.

Conclusion

[55] I find that Mr. Landry is and always was a member of the class action. The amendments adding Mr. Frutcher do not add any new causes of action that run afoul of the limitation periods at play.

[56] Costs, if not agreed to between counsel, may be addressed by written submissions provided to the court by August 22, 2025. Submissions to be limited to 3 pages not including a draft bill of costs, offers exchanged and authorities.

Heard on the 18th day of November 2024.
Dated at the City of Edmonton, Alberta this 25th day of June 2025.

M.E. Burns
J.C.K.B.A.

Appearances:

Andrew Morganti, Berger Montague (Canada) PC
for the Plaintiffs

Albert Pelletier, Berger Montague (Canada) PC
for the Plaintiffs

Vincent DeMarco, Berger Montague (Canada) PC
for the Plaintiffs

Daniel Murdoch, Stikeman Elliott LLP
for the Defendants

Natasha Doelman, Stikeman Elliott LLP
for the Defendants